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No. 86-1414

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF OREGON,

Petitioner,

v.

MARY SETTLER,
CARL SETTLER, and
RANDY ALVIN SETTLER,

Respondents.

On Petition for Writ of Certiorari
to the Court of Appeals
of the State of Oregon

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

May a state obtain a felony conviction for violation of state fishing laws against a member of an Indian tribe with tribal fishing rights without proving a conservation necessity at trial?

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STATEMENT OF THE CASE

Facts

Petitioner has accurately stated the stipulated facts under which this case was tried (pp. 4-5). However, as it has throughout this case, petitioner failed to cite tribal regulations that prohibited the specific acts committed by respondents: selling or possessing food fish out of season rather than the act of fishing itself.

REASONS WHY THE PETITION SHOULD BE DENIED

Even before the Constitution was adopted, Native American Indians were particularly wary of expanding state powers. The Framers of the Constitution intended that the federal government, not the states, would regulate Indian matters. U.S. Const. art. I, § 8, cl. 3. When treaties were signed between the federal government and the Pacific Northwest Indian tribes, it was intended that the tribes' commercial fishing rights would be protected against state interference by the "Great Father" in Washington. Wilkinson, *American Indians, Time and the Law* (1987).

In the years following the Treaty with the Yakimas, 12 Stat. 951 (1855), actions by the states resulted in substantially reduced Indian fishing. There has been frequent litigation in this area. In countless cases, continuing up to the present, the federal government assisted the Indians in asserting their treaty rights against the states of Oregon and Washington, *infra.* On several occasions, the states openly resisted federal court orders. *See e.g., Puget Sound Gill Netters Ass'n v. United States District Court,* 573 F.2d 1123, 1126 (9th Cir. 1978), *affirmed* 443 U.S. 658 (1979).

In 1942, this Court construed the Yakima Treaty as requiring that, before a state can obtain a conviction in state court against a treaty Indian for unlawful fishing at a site

covered by the treaty, the state must show that its regulations "are necessary for the conservation of fish." *Tulee v. Washington*, 311 U.S. 681, 684 (1942). Subsequently, similar language in other treaties has been interpreted to require proof of a conservation necessity before a state can enforce its regulations against treaty Indians. *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392 (1968) *(Puyallup I)* (interpreting the Treaty of Medicine Creek) and *Antoine v. Washington*, 420 U.S. 194 (1975) (interpreting treaty-like Congressional legislation). This principle has become known as the conservation requirement.

There is no support for petitioner's legal argument that a temporary abatement of what petitioner calls "the state/tribal conflict" eliminates the conservation requirement, even if a state court finds that an Indian was fishing in violation of tribal regulations. Moreover, if there were legal support for such an argument, it would be inapplicable to the instant case because the state/tribal conflict between the State of Oregon and the Yakima Nation remains very serious to the present day. And more importantly, petitioner has never shown that respondents, who were charged in state court with possession and sale of food fish out of season, have actually violated any Yakima tribal regulations, which only prohibit the act of fishing out of season.

Accordingly, the writ should be denied.

I.

A. The state/tribal conflict, which was a significant reason for the treaties between the federal government and the tribes, continues to exist between the State of Oregon and the Yakima Nation.

B. The Conservation Requirement is based on judicial construction of the 1855 treaty itself and the intentions of the parties at the time it was signed. It is

therefore not subject to revision when the state/tribal conflict is temporarily in abatement.

C. The State of Oregon is incorrect in asserting that adoption of its argument would make it easier for state authorities to prosecute fishing violations against Indians with tribal fishing rights.

INTRODUCTION

The State of Oregon, in its Petition for Writ of Certiorari, asserts that the "conservation requirement" — the mandate from this Court that a state must prove a conservation necessity before enforcing its fishing regulations against treaty Indians — is a flexible, court created doctrine based on the continuing historical conflict between this nation's Indian tribes and the states. Petitioner then maintains (pp. 8-11) that such conflict no longer exists between it and the Yakima Indian Nation. Petitioner concludes that when the "state/tribal conflict" does not exist, and when a State criminal court finds that an Indian is fishing in violation of tribal regulations, the state can enforce its fish and game laws against the treaty Indian without the need to show conservation necessity. Furthermore, petitioner asserts that adoption of its position would ease the burden on the local authorities that prosecute Indians for fishing violations.

This argument fails on each of its central premises. First, it fails on the facts: there has not been a significant reduction in the prolonged conflict between the State of Oregon and the Yakima Indian Nation. Second, it fails on the law: a temporary relaxation in tensions between one state and a particular tribe is irrelevant to the conservation requirement, which is based on judicial construction of the Indian treaties themselves. And third, it fails in its assumption (pp. 8, 14) that it would result in significant savings of resources at the local prosecution level.

A. The state/tribal conflict, which was a significant reason for the treaties between the federal government and the tribes, continues to exist between the State of Oregon and the Yakima Nation.

(1). Historical Background

In the first heading of the Petition for Certiorari, under the section **REASONS FOR ALLOWANCE OF WRIT,** petitioner states: "The state/tribal conflict which in prior cases prompted this Court to require states to prove conservation necessity does not exist here." (p. 8). This statement, the linchpin of the State's argument, is incorrect.

In order to examine the current relationship between the State of Oregon and the Yakima Indian Nation, it is necessary to briefly review what petitioner has called the "state/tribal conflict."

Historically, one of the central reasons that Native American Indian tribes entered into treaties with the federal government was to obtain protection against the emerging powers of the states. Professor Charles Wilkinson, in *American Indians, Time and the Law,* 17 (1987), points out that "whatever the motives and whenever the era, presidents, commissioners, and Indian agents repeatedly reassured treaty tribes that the Great Father in Washington would secure the Indian people in their newly demarcated lands against the rising tide of white civilization."

The primary role of the federal government vis-a-vis the states in Indian affairs was specifically stated in the Constitution: "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

James Madison, the principal writer of the Indian Commerce Clause, argued that this provision, by vesting the primary power over Indian affairs in the federal government,

would eliminate problems confronted during the period of the Articles of Confederation, when the states claimed authority over Indian relations and lands. See, e.g., J. Madison, *Journal of the Federal Convention* 190, 549 (E. Scott ed. 1898).

The Constitutionally mandated inferior role of the states with regard to Indian affairs was affirmed early in the jurisprudence of this Court. In *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 594 (1832), Chief Justice John Marshall wrote that under the Indian Commerce Clause, the federal government "has the exclusive regulation of intercourse with the Indians; and so long as this power shall be exercised, it cannot be obstructed by the state."

The role of protector of the Indians against state power was specifically assumed by the federal government in treaty negotiations in the mid-Nineteenth Century. The Governor of the Washington Territory, Isaac Stevens, who negotiated the treaties with the Northwest's Indian tribes, explained a similar fishing provision to tribal members gathered at Point-No-Point:

> "Are you not my children, and also children of the Great Father? What will I not do for my children, and what will you not for yours? Would you not die for them. * * * This paper is such as a man would give to his children and I will tell you why * * *. This paper secures your fish. Does not a father give food to his children?"

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 667, n. 11 (1979).

In the treaty negotiations, the Northwest tribes were particularly concerned that their commercial fishing rights be protected. The Attorney General of Oregon has stated that "the Indians who fished the Columbia river historically used their catch for barter as well as for subsistence and ceremonial purposes. Presumably, the treaties were entered into with the expectation that the Indians would be permitted to barter or sell what they caught." *36 Op. Ore. Att'y Gen.* 531, 534 (1973).

This Court has recognized the importance that hunting and fishing rights played in the Treaty with the Yakimas, 12 Stat. 951 (1855). In *Tulee v. Washington*, 311 U.S. 681, 684 (1942) the Court discussed the treaty negotiations:

> "From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes."

Tulee held that a state could regulate merely the time and manner of Indian fishing at the "usual and accustomed places", and then only if the regulations were "indispensible to the effectiveness of a state conservation program." 315 U.S at 685. This approach was affirmed in *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392 (1968) *(Puyallup I)*, *Washington Game Dep't v. Puyallup Tribe*, 414 U.S. 44 (1973) *(Puyallup II)*, and *Antoine v. Washington*, 420 U.S. 194 (1975).

Thus, the historical record is clear that the "state/tribal conflict" was a central basis for negotiation of the treaty provision in 1855 guaranteeing the Yakimas "the right of taking fish at all usual and accustomed places." Article 3 of the Treaty with the Yakimas, 12 Stat. 951 (1855).

(2). Recent legal history (1970s and 1980s)

The State argues that the above historical conflict between the tribes and the states no longer applies to its relations with the Yakimas: "In this instance, as a result of federal court decision and negotiated compacts approved and supervised by the court, the state and the tribes are in agreement, not conflict" (p. 7). The State of Washington has filed a Brief as *Amicus Curiae* in support of Oregon's position. Yet, their argument is without foundation: this conflict has extended to the present.

In the years after the signing of the treaty in 1855, the states of Oregon and Washington acted steadily to decrease

the fish taken by members of the Yakima Nation. It was only the intervention of the federal courts, often at the request of the United States government, that allowed the Yakimas to exercise the fishing rights their ancestors intended to preserve when the treaty was signed, *infra.* The landmark fishing rights decision in the Pacific Northwest was *United States v. Washington,* 384 F.Supp. 312, *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert denied,* 423 U.S. 1086, *reh denied,* 424 U.S. 978 (1976). The district court's opinion became known as the *Boldt* decision, named after the District Judge who presided over this protracted litigation.

This decision, which allocated equal portions of the fish runs between Indians and non-Indians, was of such critical importance that it has been measured statistically:

> "In 1971, 1972, and 1973 (the last 3 years before the *Boldt* decision), for example, Indians harvested 5%, 7.5%, and 6.5%, respectively, of all fish taken in Puget Sound. In 1980 and 1981 (the last years for which final figures are available), Indians took 55% and 39%, respectively. The Indian share of fish harvested on the Columbia has also increased substantially."

Wilkinson & Conner, *The Law of the Pacific Salmon Fishery: Conservation and Allocation of a Transboundary Common Property Resource,* 32 U. Kan. L. Rev. 17, 98 n.438 (1983).

Contrary to the posture of the State of Oregon in its Petition for Certiorari, and contrary to the position of the State of Washington in its *Amicus* brief in support of Oregon's Petition, both states have vigorously fought against tribal fishing rights whenever and wherever they could. They have fought the tribes, *supra.* They have fought the United States government, which has acted both as trustee for the tribes and on its own behalf in litigation to support Indian fishing rights. *See e.g., Washington v. Fishing Vessel Ass'n.,* 443 U.S. 658, 669 (1979).

The states have even fought the federal courts, thereby suffering stinging judicial criticism. For example, the United States Court of Appeals for the Ninth Circuit noted that "Except for some desegregation cases [citations omitted], the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century." *Puget Sound Gill Netters Ass'n v. United States District Court,* 573 F.2d 1123, 1126 (9th Cir. 1978), *affirmed* 443 U.S. 658 (1979). Oregon United States District Court Judge James Burns, sitting on the Ninth Circuit by designation in *United States v. Washington, supra,* wrote a concurring opinion, stating in part:

> "The record in this case, and the history set forth in the *Puyallup* and *Antoine* cases, among others, make it crystal clear that it has been the recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court. This responsibility should neither escape notice nor be forgotten."

520 F.2d at 693.

Frequent, intensive federal litigation over Indian fishing rights in the Pacific Northwest has continued in the years after Judge Boldt's decision in *United States v. Washington, supra.* Petitioner correctly states that the tribes and the states are currently involved in a court-ordered plan to jointly manage the Columbia River fishery. However, petitioner is completely wrong in stating that the existence of such a plan has eliminated tribal/state conflict.

The courts' hope that judicially mandated joint regulation of the Columbia River fishery would eliminate tribal/state conflict was a noble one. Yet, it has obviously not yet reached fruition. The numerous, recent, Indian fishing rights cases entitled "United States v. Oregon" listed in Oregon's Petition are in themselves some evidence of the serious, continuing

conflict in this area. As recently as August of 1985, the Ninth Circuit affirmed a district court finding "that the fishery regulations promulgated by the Columbia River compact violated the Indians' tribal fishing rights." *United States v. Oregon*, 769 F.2d 1410, 1412 (9th Cir. 1985) (emphasis added).

Perhaps the clearest statement of the current situation was given by Yakima Nation Tribal Chief Levi George, who testified at a hearing in the instant case. Tr. 12/21/84 at 185-202. Chief George has taken part in fishery negotiations with Oregon and Washington authorities, as well as with officials from the federal government and Canada. He succinctly summarized the tribal members' current view of the state's regulations: "they give us fishing when there's no fishing." Tr. 12/21/84 at 191.

Given this historical record, petitioner is clearly wrong in asserting that the state/tribal conflict no longer exists between the State of Oregon and the Yakima Nation. Since the alleged non-existence of this conflict is one of the petitioner's central reasons for allowance of the writ, the writ should be denied.

B. The Conservation Requirement is based on judicial construction of Indian treaties themselves and the intentions of the parties at the time they were signed. It is therefore not subject to revision when a particular state/tribal conflict is temporarily in abatement.

The second prong of petitioner's first reason for allowance of the writ is its analysis that this Court's decisions on the conservation requirement were based on state/tribal conflicts existing at the time of the prosecutions in those cases. This analysis is incorrect: the conservation requirement is founded on this Court's interpretation of the treaties themselves, based upon the intentions of the parties when the treaties

were signed. Thus, even if the state/tribal conflict between a particular state and a tribe were temporarily in abatement, the state would still be required to prove a conservation necessity before enforcing its criminal fishing laws against treaty Indians.

The "conservation requirement" was first announced by this Court in *Tulee v. Washington,* 311 U.S. 681 (1942). *Tulee* reversed a Washington state court conviction of a Yakima tribal member for catching salmon with a net without first having obtained a state license. Sampson Tulee had unsuccessfully challenged the application of the statute to him in the state trial court and in the Washington Supreme Court on the ground that it was repugnant to the Yakima treaty. 315 U.S. at 682. In arguments to this Court, both the State of Washington and the defendant relied upon their constructions of the treaty. *Id.* The Supreme Court, in a unanimous opinion by Justice Black, based its holding squarely upon the treaty itself:

> "We think the state's *construction of the treaty* is too narrow and the appellant's too broad; that while the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here."

315 U.S. at 684. Significantly, the *Tulee* Court did not rely upon the factual conditions at the time of its decision, but upon the conditions existing at the time the treaty was signed:

> "It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people."

315 U.S. at 684-685. *Also see Puyallup Tribe v. Dep't of Game,* 391 U.S. 392 (1968) (*Puyallup I*) (interpreting the Treaty of

Medicine Creek) and *Antoine v. Washington,* 420 U.S. 194 (1975) (interpreting treaty-like Congressional legislation).

Because the conservation requirement is based upon judicial construction of the Treaty with the Yakimas of 1855 and the conditions existing at that time and place, a temporary cessation of the state/tribal conflict in the 1980s, even if such a cessation did exist, cannot support that requirement.

C. The State of Oregon is incorrect in asserting that adoption of its argument would make it easier for state authorities to prosecute treaty Indians for fishing violations.

In its Petition, the State of Oregon asserts (pp. 8, 14) that the conservation requirement is a burden at the local prosecution level. Yet, Petitioner does not support this assertion with citations either to the record or to legal authorities.

But in any event, it is clear that the position urged by petitioner in lieu of the conservation requirement would be equally burdensome to local prosecutors and courts. The determination of the first prong of the petitioner's test (p. 9), whether "the kind of state/tribal conflict present in the *Puyallup* cases and *Antoine*" exists in a particular case, would require a delicate analysis by the state trial court of the current relations between the criminal defendant's tribe and the prosecuting state. Litigation of this delicate concept would likely involve as great an expenditure of local resources to prove favorable state/tribal relations as are now involved in proving conservation necessity.

The second part of petitioner's analysis requires a determination by *the state court* of whether the Indian defendant was fishing in violation of tribal regulations. The interpretation of tribal regulations by state courts is inconsistent with one of the Indians' primary purposes in negotiating the treaties: protection from state powers. Section I (A), *supra.*

Therefore, petitioner's approach is as unworkable as it is legally unsupportable and the writ should be denied.

II.

The conservation requirement exists in state criminal courts independently of any determination of whether a treaty Indian is fishing in violation of tribal regulations.

A. A tribe's authority to regulate the treaty fishing rights of its members does not create a state court power to convict treaty Indians without the proof of conservation necessity, even if the state court were to find that an Indian was fishing in violation of tribal regulations.

Petitioner seeks to deny a significant protection of the treaties, the conservation requirement, to all Indians charged in state court who are found to be fishing in violation of their own tribe's fishing regulations. Throughout this litigation, petitioners have been unable to cite a single decision from any jurisdiction in direct support of this analysis other than *State v. Gowdy,* 1 Or. App. 424, 462 P.2d 461 (1969), *reh. denied* (1970).

Instead of court decisions, the petitioner has cited a 1962 Memorandum Opinion from the Department of Interior and an *amicus* brief filed in 1969 (pp. 12-13). Petitioner's argument is conceptually based on the broad statement that treaty rights are vested in the tribe. Respondents have no quarrel with this as a general proposition of Indian treaty law, which allows the tribes to govern their own members *in tribal courts.* Yet, this general principle cannot be extended to deny treaty protections in state courts even if the state court were to find that an Indian was fishing in violation of tribal regulations.

The leading case on the question of the tribe's power to regulate its own members is *Settler v. Lameer,* 507 F.2d 231

(9th Cir. 1974), which was specifically relied upon by petitioner (pp. 12-13). However, *Settler v. Lameer* is in clear opposition to petitioner's claims that such tribal regulatory authority can be used to deny the conservation defense to treaty Indians in state court.

The *Settler* opinion quoted from *Puyallup I* that:

> "The manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State *in the interests of conservation,* provided the regulation meets appropriate standards and does not discriminate against the Indians."

507 F.2d at 237 (*emphasis in Settler*). Moreover, after clearly emphasizing the state's limited authority to regulate commercial fishing only "in the interests of conservation", *Settler* states that:

> "once the limits of state authority have been reached there remain significant areas of fishing activities *which are not necessarily subject to state regulation.* Among these activities particularly susceptible to the tribe are: (1) the use of accustomed fishing places; *** (4) the time of taking fish ***. Appellees [The Yakima tribal police chief and the Chief Judge of the Yakima Tribal Court] had the authority to arrest and prosecute tribal members for violation of the Tribal fishing regulations."

507 F.2d at 237-8 (emphasis added). Therefore, *Settler* was addressed solely to tribal regulation "once the limits of state authority have been reached." It cannot support petitioner's approach, where tribal regulations are used to greatly expand the longstanding limits of state authority inherent in the conservation requirement.

B. Treaty Rights Protect Individual Tribal Members

When tribal treaty rights and individual treaty rights are in conflict, courts have often protected the individual Indian. Judge Boldt, in *U.S. v. Washington, supra,* plainly stated that

fishing rights are personal rights held and exercised by individual tribe members. 384 F. Supp. at 337. Judge Boldt based this conclusion on the Supreme Court's earlier pronouncement in *U.S. v. Winans,* 198 U.S. 371, 381 (1905):

> "They [the Treaty reservation of fishing rights] reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein."

And more recently, this Court acknowledged that Indian treaties conferred individual rights to the tribe's members. *McCalanahan v. Arizona State Tax Commission,* 411 U.S. 164 (1973). There, the question before the Court was whether a state may tax a reservation Indian for income wholly derived from reservation activity. The lower Court found it irrelevant whether an individual Indian's rights were being infringed, but focused only on whether the tax infringed the Tribe's right to be self-governing. The Supreme Court rejected the lower Court's restrictive view and found the appellant's rights were violated:

> "To be sure, when Congress has legislated on Indian matters, it has, most often dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation confers individual rights."

Id. at 181.

Therefore, the treaties have conferred specific rights on individual tribal members. The arguments put forth by petitioner in support of tribal treaty rights merely support the tribe's own attempts to regulate its members. Petitioner has not shown that tribal regulations, as interpreted by state criminal courts, can deny important federal treaty rights to an individual tribal member.

C. State Courts are Not Appropriate Interpreters of Indian Tribal Regulations

Under petitioner's approach, in every prosecution for violation of fishing laws against treaty Indians, the state criminal court would be required to determine whether the defendant had violated any tribal fishing regulations. Such interpretation of tribal regulations by a state court is not appropriate given the historical conflict between the tribes and the states, *supra.*

Furthermore, it is remarkable that such an approach would be suggested by the States of Oregon and Washington, given their history of fighting against Indian fishing rights, *supra,* given the comments of the Ninth Circuit in comparing state efforts to frustrate Indian fishing rights to similar efforts in desegregation cases, *Puget Sound Gill Netters Ass'n v. United States District Court,* 573 F.2d 1123, 1126 (9th Cir. 1978), *affirmed* 443 U.S. 658 (1979), and given Judge Burns's statement that the recalcitrance of Washington State officials which produced denial of Indian fishing rights "should neither escape notice nor be forgotten." *United States v. Washington, supra.*

The petitioner's approach is particularly troublesome in the instant case, where the state was seeking to convict the three respondents of 100 years worth of felony offenses for violations of unspecified tribal regulations that were neither noted in the indictment nor at trial.

Finally, the comments of the Yakima Nation tribal prosecutor at a hearing in the instant case are appropriate: "it's difficult for me to understand why a sovereign would want to enforce another sovereign's regulations." Tr. 12/21/84 at 223.

For these reasons, petitioner's approach, whereby the state criminal court would construe tribal regulations in order to deny tribal members important treaty fishing rights, has never been adopted by any court except for the Oregon Court of Appeals in *Gowdy, supra.* Now that *Gowdy* has been overruled, *sub silentio,* in the instant case, the courts of all 50

states are in agreement. Therefore, there is no reason for this Court to allow the writ.

III.

This case presents an inappropriate factual record to address the issues raised in the petition.

A. There was no proof at trial that these defendants violated any tribal regulations.

At trial, the prosecution did not attempt to prove conservation necessity, but instead relied upon asserted violations of tribal regulations. However, as was pointed out by the defendants both at trial (Tr. 2/5/85, pp. 26-27), and before the Oregon Court of Appeals (App. Br. pp. 27-28), the prosecution never cited any specific tribal regulations upon which they were relying. More importantly, of the numerous tribal regulations introduced at trial (C.R. 171-172, Exhibit "A"), none are addressed to the specific acts committed by the defendants: possessing or selling fish out of season. Since the tribal regulations are only addressed to the act of fishing itself, the prosecution never proved that any tribal regulations were violated. Therefore, even under the approach presented by petitioner, defendants could not have been convicted of violations of state law. Accordingly, this case is an inappropriate one for review by this Court.

B. There was insufficient evidence presented at trial that the fish sold by the defendants were taken from the Columbia River.

The defendants were charged in ten indictments with possessing, receiving, and selling food fish from the Columbia River during a closed season in violation of Ore. Rev. Stat. § 509.011. The state attempted to prove that the fish were taken from the Columbia through two pieces of evidence: first, paragraph 1 of the stipulation, Exhibit I (quoted in the

Petition at pp. 4-5), indicates that on June 30, 1983, the defendants possessed or sold fish; second, paragraph 8 of the stipulation states that one of the fish seized on June 30, 1983 had a snout tag identifying it as having been released in March, 1979 in the Columbia River.

Apparently, the prosecution was relying on the folk wisdom that salmon invariably return to spawn in the same river where they were hatched. There was absolutely no scientific evidence submitted in support of this contention at trial. Furthermore, there was no request made that the trial court take judicial notice of this "fact", nor did the trial court take judicial notice on its own. Defendants disputed this "evidence" both in the trial court (Tr. 2/5/85, p. 29) and in the Oregon Court of Appeals (App. Br. p. 28-29).

Therefore, this case is an inappropriate one for review by this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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